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In The

Supreme Court of the United States

Philip L. Stotter, Petitioner

v.

University of Texas at San Antonio and Guy Bailey, Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petition for Writ of Certiorari

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Questions Presented

1. Did Petitioner lose his federally guaranteed right to a jury trial under the Seventh and Fourteenth Amendments when after a jury returned a verdict in his favor, the U.S. District Court for the Western District of Texas granted a Rule 50 motion for judgment as a matter of law and the U.S. Court of Appeals for the Fifth Circuit affirmed without conducting a review of the record evidence or evaluating the evidence to support the jury verdict?

2. Did Petitioner lose his federally guaranteed right to due process under the Fifth and Fourteenth Amendments when after a jury returned a verdict in his favor, the U.S. District Court for the Western District of Texas granted a Rule 50(b) motion for judgment as a matter of law on grounds not raised in the Rule 50(a) motion and the U.S. Court of Appeals for the Fifth Circuit affirmed without conducting a review of the grounds to determine if Petitioner had adequate notice?

3. In considering and ruling on a Rule 50(b) motion are the lower courts required to treat all litigants under the same or similar circumstances equally as guaranteed by the Fourteenth Amendment? In performing a de novo review of the grounds articulated in support of a Rule 50 judgment, must a court refer to the motions and the nature of the notice provided in its order or decision? In ruling on a Rule 50 motion, may a court simply state that it conducted a de novo review of the record without actually referring to the evidence it reviewed in its order or decision?

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CITATIONS OF OPINIONS and ORDERS

The unpublished decision of the Court of Appeals for the Fifth Circuit in *Philip L. Stotter, PhD v. University of Texas at San Antonio, et al,* C.A. No. 09-50415, dated April 8, 2010, affirming the district court's order granting Defendants' Rule 50(b) Motion for Judgment as a Matter of Law, is set forth in the Appendix hereto (App. 1-4)

The Order denying Petition for Rehearing in *Philip L. Stotter, PhD v. University of Texas at San Antonio, et al,* C.A. No. 09-50415, dated May 12, 2010, is set forth in the Appendix hereto (App. 5-6)

The district court's order in *Philip L. Stotter, PhD v. University of Texas at San Antonio, et al,* D.C. No. 01-CV-434-OLG, dated April 14, 2009, granting Defendants' Rule 50(b) Motion for Judgment as a Matter of Law, is set forth in the Appendix hereto (App. 7-12)

Record Excerpts of Defendants' Rule 50(a) Motion for Judgment as a Matter of Law made at the close of Plaintiff's evidence in *Philip L. Stotter, PhD v. University of Texas at San Antonio, et al,* D.C. No. 01-CV-434-OLG, is set forth in the Appendix hereto (App. 13-18)

The Motion for Judgment as a Matter of Law made after the jury's verdict in favor of Petitioner in *Philip L. Stotter, PhD v. University of Texas at San Antonio, et al,* D.C. No. 01-CV-434-OLG, dated February 27, 2009, is set forth in the Appendix hereto (App. 19-37)

The published decision of the Court of Appeals for the Fifth Circuit in *Philip L. Stotter, PhD v. University of Texas at San Antonio, et al*, C.A. No. 06-50305, affirming in part and reversing and remanding in part, is set forth in the Appendix hereto (App. 38-62)

BASIS FOR JURISDICITON IN THIS COURT

The Judgment of the United States District Court of Appeals for the Fifth Circuit affirming the District Court's grant of Judgment as a Matter of Law pursuant to Fed. R. Civ. Proc 50(b) was entered on April 8, 2010. (App. 1-4)

The Order Denying Petition for Rehearing was entered on May 12, 2010. (App.5-6)

This Petition for Writ of Certiorari by Stotter is filed within ninety (90) days from the date the Petition for Rehearing was denied. 28 U.S.C. §2101(c)

The jurisdiction of this Honorable Court is invoked pursuant to the provisions of 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY and RULE PROVISIONS AT ISSUE

United States Constitution, Article III, Sec.1

> The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time establish ...

United States Constitution, Amendment V

> ... nor shall private property be taken for public use without just compensation.

United States Constitution, Amendment XIV, Sec. 1

> ... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law...

28 U.S.C. §1331

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. §1343(a)(4)

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person...(3) to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights...

42 U.S.C. §1983

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any

State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, and shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

Federal Rules of Civil Procedure, Rule 50(a) & (b)

(a) Judgment as a Matter of Law
(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.
(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and facts on which the moving party is entitled to the judgment.
(b) Renewing Motion for Judgment After Trial... If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding

> the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment ... In ruling on a renewed motion, the court may: (1) if a verdict was returned: (A) allow the judgment to stand, (B) order a new trial, or (C) direct entry of judgment as a matter of law...

STATEMENT OF THE CASE

The Petitioner Philip L. Stotter, PhD (Stotter) was a tenured Professor of Chemistry at the University of Texas at San Antonio (UTSA) between approximately 1976 and 2002. During the fall of 2000, Stotter was requested by University administrative personnel to address health and safety concerns in his laboratory located at the UTSA campus. After numerous communications between Stotter and administrative personnel regarding the condition of his laboratory, Dr. Guy Bailey, the Provost, sent a certified letter to Stotter on Friday, February 23, 2001 wherein Stotter was notified that the University planned to clean his lab and that if Stotter had personal belongings or materials synthesized for use in, or as part of an ongoing project, he had to make arrangements to identify those items and materials before the clean up commenced at 9:00 a.m. on Monday, February 26, 2001. Stotter was provided with notice of the letter from the United States Postal Service on February 28, and received the letter on March 1 well after the clean-up of his laboratory began on February 26, 2001.

When Stotter was finally allowed into his laboratory, he determined the extent of loss: the removal of literally everything of value in his lab including equipment and chemicals that had never posed any health or safety hazard.

Stotter filed a lawsuit in state court in May 2001 asserting federal due process violations in connection with the loss of personal property, and his personal, professional and/or proprietary property rights in non-inventoried and expendable laboratory equipment and supplies, fine chemicals, research synthetic chemicals, and botanicals, research notebooks, spectrometric data, personal and research data stored on the University's computer hard drive and on disks and diskettes located at the University. Stotter claimed that his procedural due process rights were violated when he was deprived of his property during the clean-up of his lab without first giving him sufficient notice and an opportunity to retrieve it. The University defendants removed the suit to the United States District Court for the Western District of Texas.

Thereafter, the University defendants filed a motion for summary judgment. The district court granted the motion, but in so doing conceded that the February 23, 2001 notice letter from Dr. Bailey was insufficient to give Stotter sufficient time to remove any personal items from his lab. With respect to Stotter's due process claims, the district court concluded that he could not pursue a federal due process claim because 1) he had an adequate post deprivation remedy, i.e. a state law conversion claim

and 2) he had not adequately identified any items or materials in which he had a protected property right.

Stotter appealed the dismissal of his suit to the United States Court of Appeals for the Fifth Circuit. In a published decision, the appeals court reversed and remanded in part, concluding that Stotter's due process claims were not contingent on the unavailability of post-deprivation remedies and in considering the evidence in a light most favorable to Stotter, he had sufficiently identified property in which he claimed protected property rights. See Stotter v. University of Texas at San Antonio, et al; 508 F.3d 812, 822 (5th Cir. 2007).

Regarding the district court's conclusion that Stotter had failed to identify any particular item that was removed from his lab in which he had a sufficient property interest, the appeals court noted that property interests protected by the due process clause include at least ownership of real estate, chattels, and money. See id citing Bd. of Regents v. Roth, 408 U.S. 564, 572 (1972) and Mahone v. Addicks Util. Dist., 836 F.2d 921, 929 (5th Cir. 1988). The appeals court further noted that in construing Stotter's affidavit testimony in a light most favorable to him, a reasonable jury could conclude that Stotter had a property interest in items including "... book cases, storage cabinets, a chemical library, personal journals, notebooks, documentation that reflected his research and work generated during his tenure at UTSA, and many non-inventoried chemicals and related materials not purchased by UTSA or with funds belonging to UTSA." See Stotter 812 F.3d at 822.

After remand, the case proceeded to trial on February 9, 2009. At issue was whether Stotter had adequate notice of UTSA's intention to clean his laboratory and whether he had a property right in any of the items or material removed from his lab. During the trial, Stotter presented evidence of his property rights in various items in his lab including documented research materials, a chemical library, and glassware and equipment. Stotter established his property rights in those items under two theories: 1) UTSA's intellectual property policies which granted ownership rights to faculty in "scholarly or educational" materials they authored and 2) mutually explicit understandings between Stotter and UT officials at both the University of Texas at Austin and UTSA.

At the close of Stotter's evidence the University defendants made an oral motion for judgment pursuant to Fed. R. Civ. Proc. 50(a). The grounds for the Rule 50(a) motion were threefold: 1) Stotter had not carried his burden to demonstrate what particular items he brought with him to UTSA from the University of Texas at Austin and the University paid to transport those items; (App. 16) 2) Stotter's research notebooks belonged to the University because they contained information generated under grants, donations, gifts, whatever, however funded, the funds were the University's since they were generated on UTSA property, using UTSA's electricity, water, insurance, all of those things; (App. 16) and 3) Stotter hadn't offered evidence that he purchased any of those things with his own funds. (App. 16)

The trial court denied the Rule 50(a) motion and the case was submitted to the jury. In relevant part the jury was instructed as follows:

> "...property interests are often expressly created by state statutes or regulations, although they can also arise from written or unwritten state or local government policies or from mutually explicit understandings between a government employer such as UTSA, and its employee, Dr. Stotter."

A unanimous jury returned a verdict in favor of Stotter finding 1) that he was not provided with adequate notice of the clean-up of his lab and 2) that he had a property right in items and materials that UTSA removed from his lab. The jury awarded Stotter monetary damages for his documented research materials, but not for his chemical library or any glassware or equipment.

After the jury verdict in Stotter's favor, the University defendants timely filed a written motion for judgment pursuant to Fed. R. Civ. Proc. 50(b). (App.19-37) However, the Rule 50(b) motion included grounds and law not raised in the earlier Rule 50(a) motion as required. The grounds for the Rule 50(b) motion were 1) that Stotter had failed to establish that anyone who had given him items and materials in his lab had authority to make a gift; (App. 22) and 2) that Stotter had failed to prove the intellectual property policies granted him a property interest in the items or materials at issue. (App.22-29) In support of these new grounds the University

Defendants cited to other University's intellectual property policies and raised new arguments and legal authority not cited or relied on in their oral Rule 50(a) motion.

Stotter filed a written response and objected to the newly asserted grounds and authority, and any reliance on other University's policies. On April 12, 2009, the U.S. District Judge, Garcia, O., granted the University Defendants' Rule 50(b) motion. (App.7-12) Judge Garcia observed that under the University's intellectual property policies Stotter's documented research belonged to the University unless he showed they were "scholarly or educational" material. Without conducting any evidentiary review of the evidence to support the jury verdict, Judge Garcia concluded "the contents of the notebooks included documentation of Dr. Stotter's laboratory research. This is so because [he] testified that he lost a proffered research contract due to his inability to utilize his documented research, and that he was unable to utilize the research contained in the notebooks to publish articles related to that research." (App. 11)

In the order granting the Rule 50(b) motion, Judge Garcia made erroneous evidentiary conclusions not supported by the record evidence and never considered or addressed Stotter's alternate theory that he acquired property rights through mutually explicit understandings between himself and UT officials.

On April 8, 2010, the Court of Appeals for the Fifth Circuit affirmed the District Court's order granting judgment as a matter of law to the University

Defendants in an unpublished opinion without conducting any de novo review of the evidence which would support the jury verdict. (App. 1-4) Stotter now brings to this Court his petition seeking a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

ARGUMENT SUPPORTING ALLOWANCE of the WRIT

1. This Court's Superintendence of the Federal Judiciary to Insure that It Safeguards the Seventh Amendment's Guarantee of a Right to Jury Trial to Civil Litigants in Ruling on Rule 50 Motions for Judgment as a Matter of Law Warrants the Granting of this Petition.

In Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 149-151 (2000), this Court noted that the Courts of Appeals had articulated different formulations as to what evidence a court is to consider in ruling on a Rule 50 motion; some courts limited review to that evidence favorable to the non-movant while most reviewed the entire record, drawing all reasonable inferences in favor of the non-moving party. In discussing these approaches, this Court noted a distinction between what evidence a court must give credence to and what evidence a court must review. Because the standard for granting a Rule 56 motion for summary judgment "mirrors" the standard for granting a Rule 50 motion for judgment as a matter of law, and the inquiry under both is the same, this Court concluded the standard of review is the same for both. In considering a motion for judgment as a matter of law, a court should review all of the evidence in the

record. See id at 150 citing Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-251 (1986); and Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

However, in conducting its review of all the evidence in the record, a court is required to draw all reasonable inferences in favor of the nonmoving party and it may not make credibility determinations or weigh the evidence. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge ... The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor". See Liberty Lobby, Supra at 255.

In the present case, in considering the post verdict Rule 50 motion, District Judge, Garcia, O. did not review all the evidence in the record, he did not draw all reasonable inferences in favor of Stotter, he did not take all of Stotter's evidence as true, and he did not disregard all evidence favorable to the University Defendants that the jury was not required to believe. (App.7-12) Instead, as reflected in the Order granting the Rule 50 motion, Judge Garcia improperly weighed the evidence and/or made credibility determinations regarding witness testimony. (App.11) Finally, Judge Garcia only addressed one of the theories Stotter relied on to establish his property rights; i.e. his asserted ownership under UTSA's intellectual property policies. Judge Garcia never considered or evaluated the record evidence to determine if the jury verdict was supported by

sufficient evidence that Stotter had property rights to items and materials in his lab based on mutually explicit understandings between himself and UT officials. (App. 7-12) Stotter's testimony regarding his mutually explicit understandings with UT officials was uncontroverted.

The appeals court also failed to apply the correct standard of review; the unpublished panel decision included no evidentiary review whatsoever. (App. 1-4). Instead, the minimal opinion stated in relevant part as follows:

> "Likewise, our de novo review of the district court's ruling on Bailey's JMOL motion satisfies us that it was providently granted. Stotter failed to present sufficient evidence to establish that he had a protectable property interest in the subject notebooks. Accordingly, no reasonable jury could have found the presence of such an interest when, as here, the law does not allow it. Stotter's argument that his notebooks fall under the "scholarly or educational materials" exception in UTSA's IP policy is not borne out by the evidence. That exception would apply only if the materials at issue were published or copyrighted or "copyrightable," yet Stotter's evidence was not sufficient to demonstrate that the notebooks in question contained material other than research data. Accordingly, the district court's JMOL reversing the jury award to Stotter is AFFIRMED." (App. 4)

Although the decision states that a de novo review of the district court's ruling was conducted, the decision does not state, and includes no indication, that the court conducted a review of the entire record under the applicable standard; it did not draw all reasonable inferences in favor of Stotter, it did not take all of Stotter's evidence as true, and it did not disregard all evidence favorable to the University Defendants that the jury was not required to believe.

And, just as the trial court failed to address both of Stotter's theories regarding the source of his property rights, the appeals court also failed to consider or evaluate the record evidence to determine if the jury verdict was supported under Stotter's claim to property rights based on mutually explicit understandings between himself and UT officials. (App. 1-4) Stotter petitioned the Panel for rehearing and specifically brought this failure to address the alternative theory to the attention of the appeals court citing to the prior published opinion in Stotter v. University of Texas at San Antonio, et al; 508 F.3d 812 (5th Cir. 2007) which specifically found that a reasonable jury could conclude that Stotter had property rights in items and materials in his lab. Stotter's petition for rehearing was summarily denied without comment. (App. 51-52)

As a consequence of the failure of the trial court and the court of appeals to conduct a review of all the record evidence, and to consider the evidence in a light most favorable to Stotter, the courts invaded the province of the jury and thereby denied Stotter his Seventh Amendment right to a jury trial. In a case such as this, when the lower federal courts have

not conducted a proper review of all the evidence, in a light most favorable to the jury's verdict, then the reversal of the jury's verdict is a violation of the Seventh Amendment and is the kind of constitutional error that this Court should correct.

The lower courts failed to apply the correct standard of review in granting and affirming the Rule 50(b) motion for judgment as a matter of law against Stotter. This fundamental error invokes this Court's duty of superintendence of the federal judiciary to insure that courts apply the correct standard of review in ruling on Rule 50 motions to prevent the unconstitutional denial of the Seventh Amendment right to a jury trial.

2. This Court's Superintendence of the Federal Judiciary to Insure that It Safeguards the Federal Constitutional Right to Due Process to Civil Rights Plaintiffs Warrants the Granting of this Petition.

It is well settled that a Rule 50(a)(2) motion made at the close of the evidence must specify the law and facts on which the movant is entitled to judgment. The purpose of this requirement is to ensure the responding party has an opportunity to cure any deficiency in his proof which might have been overlooked until called to the party's attention. See Farley Transp. Co. v. Santa Fe Trail Transp. Co., 786 F.2d 1342 (9th Cir. 1986) ("If the moving party is then permitted to make a later attack on the evidence through a motion for judgment notwithstanding the verdict or an appeal, the opposing party may be prejudiced by having lost the opportunity to present additional evidence before the

case was submitted to the jury"); Benson v. Allphin, 786 F.2d 268 (7th Cir. 1986) ("the motion for directed verdict at the close of all the evidence provides the nonmovant an opportunity to do what he can to remedy any deficiency in his case..."); and McLaughlin v. The Fellows Gear Shaper Co., 4 F.R.Serv. 3d 607 (3d Cir. 1986) (per Adams, J., dissenting: "This Rule serves important practical purposes in ensuring that neither party is precluded from presenting the most persuasive case possible and in preventing unfair surprise after a matter has been submitted to the jury").

In renewing a motion for judgment as a matter of law under Rule 50(b) after a jury verdict, the movant cannot offer new or different law and facts on which the judgment could be rendered as this would defeat the intent and purpose of providing the nonmoving party with notice and an opportunity to cure defects in evidence.

In this case, Stotter understood it was his burden to establish that he had property rights in items and materials in his lab. Stotter's claim to property rights in certain items and materials was twofold: his documented research was "scholarly or educational" material which he authored and was therefore exempt from any claim of ownership by the Board of Regents; and he was granted property rights in certain items and materials pursuant to mutually explicit understandings between himself and UT officials. To establish his claim to property rights under the IP policies, Stotter understood, and the trial court agreed, (App. 11) that it was his burden to establish that his documented research materials

could be considered "scholarly or educational" material. To satisfy this burden, Stotter offered the policies into evidence and questioned various witnesses about the policies. To establish his claim to property rights under his mutually explicit understandings with UT officials, Stotter testified regarding his conversations with officials at UT Austin and at UTSA about his ownership of items and materials that he would transfer to UTSA.

At the close of Stotter's evidence, the University Defendants made an oral motion for JMOL on essentially three grounds; 1) *Stotter did not meet his burden of proof to show what particular items he brought with him to UTSA from UT Austin*; (App. 16) 2) *Stotter's research notebooks belonged to the University because they contained information generated under grants, donations, gifts, whatever, however funded, the funds were the University's since they were generated on UTSA property, using UTSA's electricity, water, insurance, all of those things*; (App. 16) and 3) *Stotter hadn't offered evidence that he purchased any of those things with his own funds.* (App. 16)

After the jury verdict in favor of Stotter, the University made a written motion for JMOL on the two new grounds; 1) *Stotter had not established that any person who gave him anything had authority to make a gift; and* 2) *Stotter had not established his property rights under the IP policies.* (App. 22-29)

It is apparent in both the District Court"s order (App 7-12) and in the Court of Appeals decision (App. 1-4) that the basis for granting judgment as a matter of law was on the second ground raised in the post trial

motion; that Stotter had not established his property rights under the IP policies. Despite objection by Stotter that the University Defendants had not raised this ground at the close of the evidence, neither lower court conducted a review of the grounds to determine whether Stotter had adequate notice of this basis as a ground for judgment.

The District Court addressed Stotter's objection to newly cited IP policies in a footnote, but did not otherwise address whether the grounds presented after trial had been articulated in the motion for judgment on the record before submitting the case to the jury. (App 10) The Court of Appeals addressed this issue as follows:

> "As a threshold matter, Stotter argues that the district court erred in considering Bailey's Rule 50(b) motion because it so differed in content from his earlier Rule 50(a) motions as to constitute waiver. After hearing oral argument by able counsel for both parties, considering the applicable law as presented in the parties' briefs, and reviewing the record on appeal, we are satisfied that Bailey's Rule 50(b) motion was sufficiently reflective of his Rule 50(a) motion as to avoid waiver." (App. 3-4)

In fact, the grounds as stated on the record at the close of Stotter's evidence do not mention the IP policies in any respect. Nor did the University Defendants argue that Stotter had failed to establish that the *contents* of his documented research included "copyrightable" expression. (App. 13-18) This ground was argued for the first time in the post

verdict Rule 50(b) motion and was the basis for granting the motion. (App.22-29)

The District Court concluded UTSA owned Stotter's documented research because it "contained documentation of his research," but did not evaluate any evidence to determine whether the jury could find his research was "scholarly or educational" material. (App. 11) Similarly, the Court of Appeals affirmed the JMOL because no jury could believe his documented research contained "copyrightable" expression. (App. 4)

Before the case was submitted to the jury, Stotter *was not* on notice that his evidence was deficient regarding the *contents* of his documented research materials, or that his burden was to prove that his documented research contained "copyrightable" expression as opposed to "scholarly or educational" material as the trial court noted. (App. 13-18)

As a litigant in the federal courts, Stotter has a constitutional right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the federal Constitution. At a minimum due process of law in the context of civil rights litigation imposes a requirement that the rules of procedure applicable to litigants be fairly applied and that the lower federal courts ensure that each party is guaranteed due process of law. This is especially so in the context of taking a jury verdict from a civil rights litigant under Rule 50 without performing a thorough review of the grounds articulated for the judgment to ensure that a successful litigant was given notice and the opportunity to cure evidentiary deficiencies before

the case is submitted to the jury. At a minimum, due process requires that lower federal courts review all of the law and facts articulated in Rule 50(a) & (b) motions to ensure the opposing party had notice of the basis for any judgment rendered against him before the case was submitted to the jury.

As a consequence of the failure of the trial court and the court of appeals to conduct a review of the law and facts articulated in the University Defendants' Rule 50 motions, Stotter has been denied his constitutional right to due process of law. In a case such as this, when the lower federal courts have not conducted a proper review of the grounds presented to support a judgment as a matter of law, then reversal of the jury's verdict is a violation of the constitutional guarantee of due process and is the kind of constitutional error that this Court should correct.

The lower courts failed to apply the correct standard of review in determining that Stotter had sufficient notice of the law and facts to support a judgment in favor of the University Defendants before the case was submitted to the jury. This fundamental error invokes this Court's duty of superintendence of the federal judiciary to insure that courts apply the correct standard of review in ruling on Rule 50 motions to prevent the unconstitutional denial of due process of law.

3. This Court's Superintendence of the Federal Judiciary to Insure that It Uniformly Applies the Correct Standard of Review in Considering a Rule 50

Motion for Judgment as a Matter of Law After a Jury Verdict in Favor of a Civil Rights Plaintiff.

The lower courts were required to conduct a de novo review of all the evidence in the record to determine if there was sufficient evidence to support the jury's verdict on either or both of the theories of the source of Stotter's property rights. Neither the District Court order granting the JMOL nor the Court of Appeals per curiam decision does so. In fact, the per curiam decision only includes 1 paragraph addressing Stotter's objection to the sufficiency of the Rule 50(b) motion and 1 paragraph addressing the sufficiency of the evidence. (App. 3-4)

Yet just before and after the unpublished decision was issued in this case, two other panels of the Fifth Circuit Court of Appeals issued decisions in cases involving jury trials and Rule 50 motions, and in each of those cases the panel performed an exhaustive evaluation of all the evidence in the record and made reference to the evidence in its opinion. See e.g., Wackman, et al v. Rubsamen, No. 08-51119 (CA5 3/10); and Carmona v. SW Airlines Co.; No 08-51175 (CA5 4/10).

The law is clearly established regarding the standard of review for granting a motion for judgment as a matter of law; the court is required to conduct a de novo review of all the record evidence, and in a light most favorable to the nonmoving party. See Reeves v. Sanderson Plumbing Products, Inc., supra. All civil litigants are entitled to be treated equally under the same or similar circumstances. One litigant should not be entitled to an exhaustive review of the

evidence supporting a jury verdict, while another should be satisfied with a cursory statement that a "de novo" review was conducted without any evaluation or reference to the evidence apparent in the court's decision. The notion that such a variance in the standard of review could satisfy equal protection guarantees, let alone basic notions of fairness and justice, is untenable. Before a court may grant a Rule 50 motion for judgment as a matter of law, it must review the entire record in a light most favorable to the nonmoving party, and include in its order or decision appropriate reference to all evidence which supports the jury verdict. Only then will civil litigants be guaranteed equal protection of the laws; only then will civil litigants rest assured that justice was done.

Stotter was treated differently than other civil litigants under the same or similar circumstances; a jury returned a verdict in his favor, but a JMOL was entered without either lower court completing a review of the entire record, in a light most favorable to Stotter, and without reference to evidence which could support the jury verdict. In a case such as this, in accordance with this Court's superintendence of the federal judiciary, courts should be required to articulate the evidentiary review conducted in considering and ruling on a Rule 50 motion. This Court should disallow the lower court practice of including a statement that a "de novo review" was conducted without reference to the evidence reviewed; this practice is not sufficient to satisfy constitutional guarantees of the right to a jury trial, the right to due process, and equal protection of the laws.

Failing to include any discussion or reference to the evidence reviewed in the order and decision granting JMOL amounts to fundamental error and invokes this Court's duty of superintendence of the federal judiciary to insure that courts apply the correct standard of review in ruling on Rule 50 motions to prevent the unconstitutional denial of the right to a jury trial, to due process of law, and the equal protection of the laws.

CONCLUSION

For all the reasons set forth herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit and, ultimately, vacate the judgment below and remand the case to the District Court for the Western District of Texas for an award of Stotter's attorney fees and costs, or alternatively remand the case to the United States Court of Appeals for the Fifth Circuit under direction to conduct a review of the entire record in a light most favorable to Petitioner. Petitioner prays for any and all other relief as is just and fair at law or in equity.

Respectfully submitted this 10th day of August, 2010.

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-50415

PHILIP STOTTER, Ph.D
Plaintiff-Appellant

v.

UNIVERSITY OF TEXAS AT SAN ANTONIO; GUY BAILEY; DAVID JOHNSON
Defendants-Appellees

Appeal from the United States District Court for the Western District of Texas
USDC No. 5:01-CV-434

Before DAVIS, WIENER, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant Philip Stotter, formerly a chemistry professor at the University of Texas - San Antonio (UTSA), is before this court for the second time on his 42 U.S.C. §1983 case implicating due process claims

* Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.5.

arising from the alleged deprivation of property without notice and a reasonable opportunity to be heard. This time he is appealing the district court's grant of Defendant-Appellee Guy Bailey's Rule 50(b) Motion for a Judgment as a Matter of Law (JMOL) following a jury verdict favorable to Stotter at the conclusion of the trial that followed our remand of this aspect of Stotter's original appeal.

We affirm the judgment of the district court based on its determination that Stotter had no protectable property interest in various notebooks that are alleged to have been lost or destroyed following the cleaning of Stotter's office and laboratory at Bailey's behest.

I. FACTS AND PROCEEDING

Stotter, a tenured chemistry professor at UTSA, was employed there from 1974 to 2002 as a research professor. UTSA provided Stotter with laboratory space, equipment, and other resources. On several occasions beginning in 1998, Stotter was informed that his laboratory and office space posed safety hazards and were otherwise not kept in good order. As early as October 31, 2000, he was informed in writing that he must address these concerns or his lab would be closed. Then, on the same day in January 2001, Stotter received two letters, one advising that his lab would be closed and that UTSA would have it cleaned out, and the other informing him that such action was being taken on

instructions from Bailey in his capacity as Provost. That action then took place on February 26, 2001.

Stotter filed suit in state court in May of that year. After Stotter's suit was removed to the district court, summary judgment was granted in favor of all defendants, which judgment was affirmed on appeal except as to Stotter's due process claim against Bailey, which was remanded for further disposition. A jury trial on that claim followed.

At the close of Stotter's case and again at the close of the evidence, Bailey made motions for a JMOL pursuant to Rule 50(a), asserting that Stotter did not have a protectable interest in any of the property lost in the cleanup. Those motions were denied, and the jury found that Bailey had violated Stotter's right to notice, that Stotter had a property interest in various items in his lab, and that he was entitled to $175,000 for the loss of his research notebooks, but was entitled to nothing for the alleged loss of the chemicals, glassware, and the like. Following the jury's verdict, Bailey renewed his JMOL motion, this time under Rule 50(b), which motion was granted by the district court, and judgment was rendered in favor of Bailey.

I. ANALYSIS

As a threshold matter, Stotter argues that the district court erred in considering Bailey's Rule 50(b) motion because it so

differed in content from his earlier Rule 50(a) motions as to constitute waiver. After hearing oral argument by able counsel for both parties, considering the applicable law as presented in the parties' briefs, and reviewing the record on appeal, we are satisfied that Bailey's Rule 50(b) motion was sufficiently reflective of his Rule 50(a) motions as to avoid waiver. The district court was, therefore, entitled to consider and rule on Bailey's quest for a JMOL under his Rule 50(b) motion.

Likewise, our de novo review of the district court's ruling on Bailey's JMOL motion satisfies us that it was providently granted. Stotter failed to present sufficient evidence to establish that he had a protectable property interest in the subject notebooks. Accordingly, no reasonable jury could have found the presence of such an interest when, as here, the law does not allow it. Stotter's argument that his notebooks fall under the "scholarly or educational materials" exception in UTSA's IP policy is not borne out by the evidence. That exception would apply only if the materials at issue were published or either copyrighted or "copyrightable," yet Stotter's evidence was not sufficient to demonstrate that the notebooks in question contained material other than research data. Accordingly, the district court's JMOL reversing the jury award to Stotter is

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No.09-50415

PHILIP L. STOTTER, Ph.D.
Plaintiff - Appellant

v.

UNIVERSITY OF TEXAS AT SAN ANTONIO; GUY BAILEY; DAVID JOHNSON,
Defendants - Appellees

Appeal from the United States District Court for the
Western District of Texas, San Antonio

ON PETITIONS FOR REHEARING AND REHEARING EN BANC

(Opinion 4/8/2010, 5 Cir, F.3d)

Before DAVIS, WIENER, and SOUTHWICK, Circuit Judges. PER CURIAM:

(Li) The Petitions for Rehearing are DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED, R. APP, P. and 5Th CIR. R. 35) the Petitions for Rehearing En Banc are also DENIED.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO, TEXAS

Philip L. Stotter, Ph.D.,	§	FILED
Plaintiff,	§	Apr 14 2009
	§	Clerk, U.S. District Court
	§	Western District of Texas
v.	§	By/S/ _____
	§	Deputy Clerk
Dr. Guy Bailey,	§	
Defendant,	§	SA-01-CA-0434-OG

ORDER

Before the Court is Dr. Guy Bailey's motion for judgment as a matter of law. Dr. Bailey asks the Court to overturn the jury verdict that awarded Dr. Philip Stotter $175,000 in damages for the loss of research materials.

"A motion for judgment as a matter of law in an action tried by jury is a challenge to the legal sufficiency of the evidence supporting the jury's verdict. "Hiltgen v. Sumrall, 47 F.3d 695, 699 (5th Cir. 1995) (parenthetical deleted). A motion for judgment as a matter of law should be granted if "the court finds that reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issye." FED.R.CIV.P.50(a)(1). A post-judgment motion for judgment as a matter of law should only be granted when "the facts and inferences point so strongly in favor of the movant that a rational jury could not reach a contrary verdict. "Waymire v. Harris County, Tex., 86 F.3d 424, 427 (5th Cir. 1996). Great deference must b

accorded to the jury's verdict and the Court will view all the evidence and draw all reasonable inferences in the light most favorable to the verdict. Brown v. Bryan County, Okla., 219 F.3d 450, 456 (5th Cir. 2000); Rhodes v. Guiberson Oil Tools, 75 F.3d 989,993 (5th Cir. 1996) (en banc).

Dr. Stotter is a former chemistry professor at UTSA. His claim against Dr. Bailey in this case is one of the procedural due process. To prevail on his claim, Dr. Storrer must show that he possessed a protected property interest in the items that were removed from his lab and that Dr. Bailey deprived him of that interest without adequate notice and opportunity to be heard.

The substance of Dr. Bailey's argument in the present motion is a legal one---that Dr. Stotter had no property right in the research notebooks and therefore cannot be awarded any sum for their deprivation. See Morley's Auto Body, Inc. v. Hunter, 70 F.3d 1209, 1212 (11th Cir. 1995) (whether plaintiff has a protectable property interest is a question of law for the Court); Tarabishi v. McAlester Reg'l Hosp., 827 F.2d 648, 652 (10th Cir. 1987) (same). The Constitution does not create property interests. Board of Regents State Colleges v. Roth, 408 U.S. 564, 577 (1972). Instead property interests are often expressly created by state statutes or regulations, although they can also arise from written or unwritten state or local government policies or from mutually explicit understandings between a government employer and employee. Cleveland Bd. Of Educ. V. Loudermill, 470 U.S. 532, 538 (1985); Perry v. Sindermann, 408 U.S. 593, 601-02 (1972);

Roth, 408 U.S. at 577.

The rules and regulations of the University of Texas System Board of Regents permit the Board to assertownership to intellectual property of all types. RULES AND REGULATIONS OF THE BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM AT 1,§ 2.2 (Ex.1[1]. The Board's intellectual property policies apply to "all persons employed by the U.T. System and the component institutions of the System, [and] to anyone using System facilities...." Ex. 1, § 2.1. The Board prohibits the use of the U.T. System or component institutions' facilities "to create, develop pf commercialize intellectual properties unrelated to the individual's employment responsibilities...." Id. at § 2.8. UTSA's policy duplicates the Board's policy. HANDBOOK OF OPERATING PROCEDURES, CH. 2, § 2.27 D (Doc. #149, Ex. 2).

The Board further categorizes it interest in intellectual property created using its facilities or resources according to its "source of support." Ex. 1, § 4. The first category of intellectual property is that which is unrelated to the individual's employment responsibility and has been developed on his or her won time without the System support or use of the System's facilities. Ex 1, § 4.1. This type of intellectual property is the only intellectual property that belongs to the creator. Ex. 1, § 5.1. The second category of intellectual property is:

> Intellectual property that is related to the individuals' employment responsibility, or has

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[1] All references to exhibits are to the exhibits attached to Dr. Baileys motion, Docket No. 149.

> resulted from activities performed by the individual on System time or with support by state funds or from using System facilities.

Ex. 1, § 4.2. This intellectual property is subject to ownership by the Board Ex. 1, § 5.2. The third and final category includes intellectual property that is supported by grant or contract with various entities. Ex. 1, § 4.3. Like the second category, the third category belongs exclusively to the Board on behalf of the component institution where the intellectual property was created, should it chose to exercise its rights to the interest. Ex. 1, §§ 5.2., 5.3.

The Board has elected *not* to assert ownership in "scholarly or educational materials...related to the author's academic or professional field...authored by students, professionals, faculty and non-faculty researchers..." Ex. 1, § 2.31. The Board's Rules and Regulations do not define "scholarly or educational materials," although Section 2.31 does indicate that the works must be "authored" and implies that they must be copyrighted or copyrightable. Dr. Bailey also argues that scholarly or educational works are "a narrow band or pedagogical, literary, artistic and creative works." Motion for Judgment at 5. Dr. Bailey relies on policies from other universities to argue that "this same term [is] defined...to include works related to teaching, such as lecture notes, problem sets, syllabi, and websites for classes, and creative works related to scholarship, such as journal articles, books and text books." Id. at n.1[2]. Lab or research notebooks belong to the entity providing the

[2] Dr. Stotter objects to reliance on the policies of other universities arguing that they were not offering evidence. The Court in this motion is deciding primarily a legal question. While Dr. Stotter's property rights are not defined by the policies of these or other institutions, they are instructive as to the generally accepted definition of scholarly and educational works.

funding for the research, typically the university or other employer.[3] Id. at n. 4.

There is no evidence in the record that the research notebooks were not kept in the course and scope of Dr. Stotter's employment at UTSA or drafted and maintained without UTSA or U.T. System support. In fact, evidence was to the contrary; Dr. Stotter testified repeatedly that what work he did was for the University while he was employed by the University. He never attempted to testify to argue that he was, for example, conducting a private business for personal gain in his University laboratory. Accordingly, under U.T. System policy, the notebook's belong to the University unless Dr. Stotter showed that they are "scholarly or educational works".

The contents of the notebooks included documentation of Dr. Stotter's laboratory research. This so because Dr. Stotter testified that he lost a proffered research contract due to his inability to utilize his documented research, and that he was unable to utilize the research contained in the notebooks to publish articles related to that research.[4] As such, the research materials belong to UTSA, the institution that employed Dr. Stotter, furnished the lab and equipment he utilized, and provided the funds for his research. See, e.g. Columbia University, RCR DATA ACQUISITION AND MANAGEMENT, available at http://ccnmtl.columbia.edu/projects/rcr/rcr-data/foundation/index.html#2-A

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[3] This was confirmed by the evidence at trial. Every chemist who testified except Dr. Stotter stated either that the notebooks belonged to the institution or that they sought permission from the institution before taking the notebooks when they left.

[4] In addition, Question 3A in the jury verdict defined the property in question as "[d]ocumented research materials reflected in journals, notebooks and other documentation including but not limited to information stored on University computers, disks, or diskettes."

("Although graduate students, postdoctoral fellows, or even some faculty in academia performing research may believe that they own data collected, they are wrong. As employees of a university, they are working for hire for the university, which, in most cases, owns the rights to the data."); Jennifer A. Thompson, IP HANDBOOK OF BEST PRACTICES, Ch. No. 8.2, available at http//www.iphandbook.org/handbook/ch08/p02/ ("The person or organization who is paying the bills owns your laboratory notebook. In most cases, this will be the company, university or institute who employers you or your supervisor.").

The Court holds as a matter of law that Dr. Stotter had no protectable property interest in research materials, and he was therefore not entitled to notice prior to their deprivation. Dr. Bailey's motion for judgment as a matter of law (docket no. 149) is GRANTED. Therefore, the award for monetary damages in Question 3A of the verdict based on the deprivation of the research materials cannot stand. The Court will enter judgment accordingly.

Signed this 14th day of April, 2009

/S/ _____
ORLANDO L. GARCIA
INITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

PHILIP L. STOTTER,
Plaintiff
VERSUS
UNIVERSITY OF TEXAS AT SAN ANTONIO, ET AL
Defendants

CASE NO.
SA-01-CV-434-OLG
February 11, 2009
February 12, 2009

Trial of the Merits
BEFORE THE HONORABLE ORLANDO L. GARCIA, UNITED STATES DISTRICT JUDGE, AND JURY
Volume 3 of 3

TRANSCRIPT ORDERED
BY: Honorable Regina Bacon Criswell

APPEARANCES:

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Court Reporter — Maurice D. West
Official Court Reporter
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San Antonio, Texas 78206

MS. DAHLBERG: Yes, we have a motion for judgment that we would like to offer at this time on behalf of the defendant.

First of all, Your Honor, the initial question, which is a legal question for the Court, is whether or not the plaintiff has established that he has a protected property right in any of the items that he's seeking relief for from the jury, and I understand at this point that the Court is asking the defendants for some law on those things and we will get that to you as soon as possible. But, in the meantime, we don't believe that the –

THE COURT: See, that the question would have been resolved—this case, as you know, was not before me, it was with Judge Justice, I believe. And I believe that question should have been resolved early on, but, in any event--

MS CRISWELL: Well, Your Honor, if I could enlighten the Court on that issue. Ms. Dahlberg wasn't involved in the case at that stage, it was another attorney.

THE COURT: Right.

MS. CRISWELL: Judge Justice inititally held that Dr. Stotter could not allege a due process claim because he had an adequate remedy at law for conversion.

THE COURT: Conversion, right.

MS. CRISWELL: And so that was—he said you can only allege a due process violation if there isn't an adequate remedy at state law.

THE COURT: Right.

MS. CRISWELL: And, of course, you can't sue the University for conversion, they're immune from that claim. And that's why we went up to the Fifth Circuit and the Fifth Circuit did find that Judge

Justice's rulings on the due process claims were erroneous because he hadn't—I mean essentially none of the parties had even evaluated the law correctly.

THE COURT: Right, and that why we're here.

MS CRISWELL: So that's why we're here because he evaluated it not on their argument that they owned everything and them providing law to that effect, just saying they had an adequate other remedy.

THE COURT: Okay. And then, of course, even if part of every—whatever was taken and not returned, your argument is going to be part of that belongs to the University in any event? That's what you're going to claim?

MS DAHLBERG: Yes, Your Honor. Whether it was returned or not returned—

THE COURT: Right, in any event, part of it.

MS DAHLBERG: --the argument is that—

THE COURT: Let's say there was 158 items removed and 158 items not returned. Other than the items already returned. I'm talking about things that Dr. Stotter claims that he had on that day in the lab that were not returned. Part of those things, I would imagine, the University is going to claim, "Well, whether they were or weren't returned, they're ours in any event." But that leaves a balance of other matters: notebooks and stuff, or items that Dr. Stotter brought from the University of Texas at Austin or purchased and had there. So go ahead with your argument about—there's a legal issue but it doesn't cover all the items. So—

MS. DAHLBERG: Well, it does cover all of the items, Your honor, because I believe that the evidence demonstrates at this point that Dr. Stotter

hasn't carried his burden to demonstrate any—he hasn't been particular about the items he brought with him from the University of Texas. He brought them—he testified that he brought them for the purposes of conducting the work at the University of Texas at San Antonio that he was hired to do. And the evidence shows that the University of Texas paid for the transport of the materials that were brought from the University of Texas System, or University of Texas at Austin so—

THE COURT: And so you're claiming that those items belong to the University of Texas?

MS DAHLBERG: Yes, they came from the University of Texas at Austin to the University of Texas at San Antonio.

THE COURT: All right. Okay.

MS. DAHBERG: The notebooks you mentioned earlier, the University asserts a property interest in those as well. Those notebooks are, again, the raw data that Dr. Stotter generated either under grants or donations, gifts, whatever. However it was funded, those funds were University funds. He generated that information in the University's lab with University property, University electricity, University water, University insurance, all of those things. Those items – he hasn't come forward with any evidence to show that he purchased any of those things out of his own pocketbook. Indeed, he testified that the money that he used that was his own, that he had donated that to the University either through his consulting business or otherwise. That's a gift to the University. And, thus, it's the University's property.

THE COURT: Are you saying then, Ms. Dahlberg, that—well, what would you claim—are

you claiming, then, that he didn't own or doesn't own anything?

MS. DAHLBERG: Of the things that he's claiming an ownership right to and asking the jury to award him money for in this lawsuit, that's right. He didn't own any of it.

THE COURT: Well, what if anything –let me put t this way, than. What, if anything did UT take in the clean-up that belongs to him?

MS. DAHLBERG: Nothing.

THE COURT: Nothing.

MS. DAHLBERG: Nothing. And the reason that the University returned the items to them was because the University was basically waiving any right that they had to those items by giving them to Dr. Stotter. It's the same thing that we've heard over and over through all of these witnesses.

THE COURT: Okay, and that's why you're going to present the law to me later on.

MS. DAHLBERG: Yes.

THE COURT: Do you have any other argument?

MS. DAHLBERG: That is the protected property right interest.

THE COURT: Right.

MS. DAHLBERG: The other issue, and this is the fact question for the jury, but is the question of whether or not Dr. Stotter received—nort procedural due process, but reasonable notice and an opportunity to respond. And the standard with which the Court reviews a motion for judgment is what, you know, what is – whether any reasonable jury could find in Dr. Stotter's favor on that particular question. And the evidence in this case is clear that Dr. Stotter was given notice on January 13th of 1999 and an

opportunity to respond. And he was given notice in March of 2000 and an opportunity to respond. And then he was given notice again in October –

THE COURT: Right, but he was told in each of those instances to do something, and I think sometimes it said do immediately.

MS. DAHLBER: Yes.

THE COURT: Bit it gave no date certain and, more importantly, it gave no consequence for failure to do something. It'd be like me telling my son, "I'm not going to take you to the Spurs"—rather, if I tell my son, "clean up your room," and he doesn't do it. Then I tell him again and he doesn't do it. But if I tell him, "You don't clean up your room, I'm not going to take you to the Spurs game," that is a consequence. And in this instance the University told him, "you have to do this immediately."

What might have been a better practice – and I'm not trying to second guess Dr. Bailey or the University System, Lord knows they have their own set of problems. But what might have been preferable might have been – perhaps in the future to say something like, "you clean up this lab within 14days unless extended in writing."

And what happened here, it appears, is that Dr. Stotter was told to do something. There was no consequence attached for the failure. There was no deadline, it says immediately. Then he got a letter. But the evidence has shown that he got the letter after the clean-up had already began, or completed. So I think there's a problem.

And I'm going to let the jury, the jury may say "No,

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

PHILIP STOTTER, PhD.,	§	
Plaintiff,	§	CIVIL NO.
	§	SA-01-CA-434-OG
v.	§	(Consolidated with
	§	SA-04-CA-0372)
GUY BAILEY, PhD.	§	
Defendant.	§	

DEFENDANT, GUY BAILEY'S MOTION FOR JUDGMENT

TO THE HONORABLE ORLANDO GARCIA,
UNITED STATES DISTRICT COURT:

Defendant, Guy Bailey, Ph. D., former Provost of the University of Texas at San Antonio, files this Motion for Judgment pursuant to FED. R. CIV. P. 5 0(b) and respectfully shows the Court the following'

I.
INTRODUCTION

This motion raises the issue of whether the Plaintiff may collect damages concerning property – laboratory notebooks – to which the Plaintiff has no demonstrated title and the specific contents of which were never even discussed at trial. As the Court is aware, Plaintiff, Philip L. Stotter, Ph.D. contends he was not afforded due process when the laboratory

entrusted to him by the University of Texas at San Antonio ("UTSA") was cleaned first by a hazardous materials team in February 2001 and again by the UTSA Chemistry Department in May 2002. The jury determined that (1) Dr. Bailey did not give Dr. Stotter adequate notice of UTSA's intent to clean up his laboratory; (2) Dr. Stotter had a property right in the items or materials removed from his laboratory; and (3) Dr. Stotter was entitled to $175,000 in damages for the research notebooks. The jury's verdict indicates it found that only the laboratory notebooks in the laboratory belonged to Dr. Stotter. However, consistent with UTSA policy, federal law and the practice of every serious research university in the higher education community, Dr. Stotter did not (and could not) have a protected property right or ownership interest in them. Accordingly, the Court should determine that Dr. Stotter did not have a protected property right in laboratory notebooks and disregard the jury's verdict. In addition, in the event the Court interprets the jury's verdict to reflect that the jury found Dr. Stotter had a protected property interest in the equipment and chemicals, that finding was likewise in error because they could only be the property of UTSA and the State and so it should be disregarded.

II.
PROTECTED PROPERTY INTEREST

Before the Court can enter judgment on the jury's verdict, it must determine whether Dr. Stotter demonstrated a deprivation of an interest in "property" within the protections of the Due Process

Clause. U.S. CONST. amend. XIV; *see Richardson v. Quarterman*, 537 F.3d 466, 472 (5th Cir. 2008) (whether due process right violated is question of law for court) Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law, rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Perry v. Sindermann*, 408 U.S. 593, 576 (1972). While *Perry* indicates that there is no rigid limit to the source of a property right, there are nevertheless limits to what is considered a property right:

> There must be some reasonably identifiable source from which the rights spring; they cannot emanate, as was said in *Perry*, from "mere subjective expectancy." The law still recognizes the immutable notion that something cannot spring from nothing. One cannot create for himself a property by proclaiming its existence. *Sims v. Fox*, 505 F.2d 857, 861-62(5th Cir. 1974) (citations omitted).

Dr. Stotter contends that he gained a property interest in his early research laboratory notebooks, a non-specific chemical library, and certain unenumerated equipment when a dean at the University of Texas at Austin gave these items to him. He further contends he obtained a property right in the laboratory notebooks, equipment and some chemicals he kept in his assigned laboratory while employed at UTSA under its and The University of Texas System's ("U.T. System") intellectual property policies.

To prove he acquired an interest in the items purportedly given to him in the 1970s, Dr. Stotter must show that the donor had authority to make a gift in the first place. And to prove he obtained an interest in the items under the U.T. System's intellectual property policy, Dr. Stotter must show that the policy granted him such an interest. *Id.*; *see Henderson v. Sotelo*, 761 F.2d 1093, 1096 (5th Cir. 1 985) (sufficiency of public employee's claim to a property interest in employment, whether created by statute or contract decided by reference to state law). The applicable state law and policies upon which Stotter relies for his purported property interest support the opposite conclusion.

A. Dr. Stotter Does Not Have a Protected Property Interest In Certain Items Formerly Contained In the UTSA Laboratory.

Dr. Stotter contends that under U.T. System's and UTSA's intellectual property policies he personally owned the laboratory notebooks in which he recorded his research. These policies do indeed grant a researcher/professor ownership rights to a limited set of intellectual property. But the research notebooks do not fall within that set. Instead the policy demonstrates the contrary; that UTSA owned the notebooks.

1. U.T. System Intellectual Property Policy

Under the rules and regulations of The University of Texas System Board of Regents ("Board"), the Board may assert ownership to intellectual property of *all* types. RULES AND REGULATIONS OF THE BOARD OF REGENTS OF

THE UNIVERSITY OF TEXAS SYSTEM at 1, § 2.2 (EX. 1).

This policy establishes the presumption that *all* intellectual property created on university time, with support of state funds, or using university facilities belongs to the Board. EX. 1 at 5, § 5.2. The Board's intellectual property policies apply to *"anyone using System facilities"* including faculty. EX. 1 at 1, § 2.1. The Board prohibits the use of U.T. System or component institutions' facilities "to create, develop or commercialize intellectual properties unrelated to the individual's employment responsibilities...." *Id.* at 3, § 2.8. UTSA's policy follows in lock-step with the Board's policy. HANDBOOK OF OPERATING PROCEDURES, Ch. 2, § 2.27(D) (Plaintiff's Exhibit 14 P.1-2) (Ex. 2).

The Board further protects its interest in any intellectual property created using its facilities or resources (including those of its institutions) by categorizing intellectual property according to its *"source of support."* EX. 1 at 4, § 4. The first category of intellectual property is that which is unrelated to the individual's employment responsibility and has been developed *without System support*. *Id.* at 4, § 4.1. This type of intellectual property is the only intellectual property that belongs to the creator. *Id.* at 4,§ 5.1. The second and third categories of intellectual property belong to U.T. System or its component institutions. *Id.* at 5-9, §§ 5.2, 5.3. The second category of intellectual property and that which is most applicable here provides:

> Intellectual property that is related to the individuals' employment

> responsibility, or has resulted from activities performed by the individual on System time or with support by state funds or from using System facilities. *Id.* at 4, § 4.2.

The third and final category includes intellectual property that is supported by grant or contract with various entities. *Id.* at 4, § 4.3. The second and final categories – including intellectual property supported by U.T. System – belong exclusively to the Board on behalf of the component institution where the intellectual property was created, should it chose to exercise its right to the interest. *Id.* at 5-9, §§ 5.2, 5.3

The Board's policy of exclusive ownership is subject only to the Board's election not to assert ownership in "scholarly or educational works" a narrow band of pedagogical, literary, artistic and creative works. EX. 1, at 3, § 2.31. Universities across the country have utilized this same term and defined it to include works related to teaching, such as lecture notes, problem sets, syllabi, and websites for classes, and creative works related to scholarship, such as journal articles, books and text books. The University of Texas System is no different. This definition is further evidenced by the fact that under U.T. System policy, scholarly works have "authors," Ex. 1 at 2, § 2.31, and "authorship" in academia

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[1] *E.g.*, Minnesota State Colleges and Universities, Board Policies, Ch. 3 Educational Policies, § 3.26 Intellectual Property,Part4(2),*available at*http://www.*mnscu.edu/board/pol*

icy/326.html (scholarly work includes syllabi, instructional material, distance learning works, journal articles, literary works); University of California Los Angeles, Office of Intellectual Property, OIPA Guide: "Intellectual Property in the University Environment," *available at http://www.research.ucla.edu/oipa/guides/intellectualproperty.htm* ("Faculty own the copyright in their scholarly works (such as textbooks and course syllabus), but not in works which are the outcome of sponsored research or were created using UCLA resources"); Washington University in St. Louis, Policy for Authorship on Scientific and Scholarly Publications, *available at http://www.wustl.edu/policies/authorship.html* (defining "scholarly publications" as "articles, abstracts, presentations at professional meetings and grant applications, [that] provide the main vehicle to disseminate findings, thoughts, and analysis to the scientific, academic, and lay communities").

assumes *publication* of some written material, regardless of its form. *Id.* It does *not* include University- or third party-funded data or research results that may form the basis for such creative works; those remain the property of the University. *Id.* Universities across the country generally maintain this dichotomy—"scholarly and educational" works (personal property of faculty) on the one hand and raw data and research results on the other (property of the university)—largely as a historical vestige of federal copyright law. Specifically, before passage of the 1976 Copyright Act codifying decades of case law that had grown up around the 1909 Act, courts had developed a "teacher exception" to the work made for hire doctrine allowing employers to own the work product of their employees. *See, e.g., Hays v. Sony Corporation of America*, 847 F.2d 412, 416-17 (7th Cir. 1988) (discussing history and rationale for teacher exception). The teacher exception was dropped from

Section 101's definition of a work made for hire in the 1976 Copyright Act, 17 U.S.C. § 101, prompting some courts to question whether Congress intended to do away with the exception under the 1976 Act. *Id.* As a result, those universities electing to permit faculty ownership of scholarly works generally do so via policy, just as the Board does so. *Id.* At the same time, courts are uniform in understanding that scholarly or educational works involve only the *creative expressions* of a professor.[2]

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[2] As the *Hays* court observed: "Although college and university teachers do academic writing as a part of their employment responsibilities and use their employer's paper, copier, secretarial staff, and (often) computer facilities in that writing, the universal assumption and practice was that (in the absence of an explicit agreement as to who had the right to copyright) the right to copyright such writing belonged to the teacher rather than to the college or university. There were good reasons for the assumption. A college or university does not supervise its faculty in the preparation of academic books and articles, and is poorly equipped to exploit their writings, whether through publication or otherwise: . . ." *Hays*, 847 F. 2d at 416.

As for research notebooks, they are traditionally repositories for the observed results of scientific inquiry (for example, laboratory data) – that is, non-creative expression. By contrast, federal copyright law protects only "original works of authorship," 17 U.S.C. § 102(a), and there can be no copyright in facts (including "principle[s]" and "discover[ies]") or "any idea, procedure, process, system, method of operation, [or] concept," 17 U.S.C. § 102(b). Non-creative expression is not protected by copyright and does not constitute scholarly or educational work. Indeed, for Dr. Stotter to tie his recovery for damages to the claim that certain laboratory notebooks included copyrightable

scholarly or educational works would be remarkable and exceptional—and was a claim completely unsupported by any evidence proffered at trial.

2. The Research Notebooks to Which Dr. Stotter Claims an Ownership Interest Belonged to UTSA.

Dr. Stotter contends that the research notebooks contained in his laboratory fall into the category of "scholarly or educational works" and thus belong solely to him. But his subjective expectation based on a misunderstanding of the policy's meaning is irrelevant. *Perry*, 408 U.S. at 576; *Sims*, 505 F.2d at 862. The policy itself is the source from which Dr. Stotter's rights, if any, spring. *Sims*, 505 F.2d at 862. And the policy makes clear that Dr. Stotter did not have any rights to the research notebooks in his laboratory.

There is no evidence in the record that the research notebooks were not kept in the course and scope of Dr. Stotter's employment at UTSA or drafted and maintained without UTSA or U.T. System support. Accordingly, under U.T. System policy, the presumption that these notebooks belong to the University stands unless Dr. Stotter showed that they are "scholarly or educational works." Dr. Stotter did not do so.

For Dr. Stotter to have made the showing that as a matter of law the research notebooks in his UTSA-owned laboratory were his own, he had to come forward with some evidence other than just his counsel's argument indicating that the notebooks

contained "scholarly or educational work." Dr. Stotter wholly failed to carry his burden. There is no evidence in the record that would have allowed the jury to reasonably infer that the research notebooks contained syllabi for Dr. Stotter's classes, his lecture notes, or a draft of a text book. Nor is there evidence in the record that the research notebooks contained journal articles, a manuscript, or any other material *authored* by Dr. Stotter that could be construed as a scholarly or educational work. Based on what Dr. Stotter said and even more so on what he did *not* say, it is clear that the notebooks did not contain scholarly work. Without this evidence, Dr. Stotter failed to overcome the "presumption" that the research notebooks contained in the laboratory belonged to the Board.[3]

The United States Supreme Court has held that a right can arise out of custom, practice, or an "unwritten common law" at a particular entity. *Perry*, 408 U.S. at 603. But Dr. Stotter' s contention that the notebooks belonged to him contravenes not only the evidence in the case—every chemist who testified at trial except Dr. Stotter stated either that the notebooks belonged to the institution or that they sought permission from the institution before taking the notebooks when they left---but it also ignores the consensus and custom among governmental and educational institutions that research notebooks belong to the funding institution.[4] Dr. Stotter therefore failed to demonstrate that some custom or practice supported his expectation of a property interest in the research notebooks in the laboratory.

Dr. Stotter is much like the plaintiff in *Sims v. Fox*, who claimed a property right in his continued

employment with the Air Force. 505 F.2d at 862. There the Fifth Circuit, noting that "[o]ne cannot create for himself a property by proclaiming its existence," held that Sims had no property right in continued military employment because he could point to nothing other than his own expectation of such a right. *Id.* Like the court in *Sims* and in the absence of specific evidence from Dr. Stotter, this Court should find as a matter of law that Dr. Stotter did not have a property interest in the laboratory notebooks in his laboratory.

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[3] While it is possible that these research notebooks *may* have contained copyrightable material, even that copyrightable material belongs to the Board Ex 1 at 1, § 2.2.

[4] *E.g.*, Washington State University and Office of Research Integrity, US Dep't Health and Human Servs, *Lab Management: Safety, Mentorship, Writing Skills, Data, and Administration*, *available at* http://ori.dhhs.gov/education/products/wsu/data_lab.html ("The one who funds the research is usually the owner."); http://ori.dhhs.gov/education/products/wsu/faq.html ("In general research institutions own the data collected with funds given to the institution); Columbia University, RCR Data Acquisition and Management, *available at* http://ccnmtl.columbia.edu/projects/rcr/rcr_data/foundation/index.html#2_A ("Although graduate students, postdoctoral fellows, or even some faculty in academia performing research may believe that they own the data collected, they are wrong. As employees of a university, they are working for hire for the university, which, in most cases, owns the rights to the data."); Jennifer A. Thomson, *IP Handbook of Best Practices*, Ch. No. 8.2, *available at* http://www.iphandbook.org/handbook/ch08/p02/ ("The person or organization who is paying the bills owns your laboratory notebook. In most cases, this will be the company, university or institute who employs you or your supervisor.")

3 Chemicals and Equipment

To the extent the Court finds that the jury found Dr. Stotter had a protected property interest in the chemicals and equipment in his laboratory, that finding is contrary to the law and unsupported by the evidence.

a. The intellectual property policies do not apply to "inputs".

UTSA's intellectual property policy defines intellectual property to include patents, trade secrets, copyrights, and trademarks. Ex. 2, § 2.27(b). Simply put, the policy applies only to the outputs – the intellectual property. On its face, the policy does not apply to the data underlying these types of intellectual property. The 'inputs', including the chemicals and equipment used to develop the outputs are not covered by the policy. *See id.* Accordingly the U.T. System intellectual property policies do not apply and are not instructive to the question of whether Dr. Stotter had a protected property interest in the chemicals and equipment in his laboratory.[5] In fact, because State money was likely used to buy the chemicals and equipment in Dr. Stotter's laboratory, UTSA, on behalf of the State of Texas, owned the inputs, *e.g.*, the chemicals and equipment, just like UTSA owned the research notebooks.

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laboratory notebook. In most cases, this will be the company, university or institute who employers you or your supervisor.")

[5] Assuming the Court determines the intellectual policy applies to the chemicals and equipment in Dr. Stotter's laboratory, because they are not "scholarly or educational work" as described in the foregoing section, *supra* Part II, A, these items did not belong to Dr. Stotter and he therefore had no right to any notice before the laboratory was cleaned up.State of Texas, owned the inputs, *e.g.*, the chemicals and equipment, just like UTSA owned the research notebooks.

b. The chemicals and equipment were in Dr. Stotter's laboratory only by virtue of his employment at UTSA.

More importantly, the overarching principle in this case and in U.T. System's intellectual property policy is that the research notebooks, equipment and chemicals contained in Dr. Stotter's laboratory were necessary to the work that he was hired to do. That he had a laboratory filled with chemicals and equipment in the very first place was possible only by his employment at UTSA. *See Frontera v. City of Columbus*, 2008 WL 5377960, *8 (S.D. Ohio, Dec. 28, 2008). It is against this backdrop that Dr. Stotter had to overcome his burden to demonstrate he had a protected property interest in the equipment and chemicals contained in his laboratory. Dr. Stotter's employment relationship with UTSA and his failure of proof, particularly in light of relevant Texas law about the use of state-owned property, demonstrate that the chemicals and equipment in the laboratory belonged to UTSA.

Texas law and the U.T. System policy regarding the use of State-owned property demonstrate that the non-inventoried, unidentified chemical library and equipment belonged to UTSA. The Texas

Constitution provides that: "The Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever..." TEX. CONST. art. II, § 51. The Texas Legislature, recognizing this constitutional provision, adopted § 2203.004 of the Texas Government Code, entitled "Requirement to Use State Property for State Purposes," which provides "State property may be used only for state purposes. A person may not entrust state property to a state officer or employee or to any other person if the property is not to be used for state purposes." The constitutional and statutory mandate is clear: no public monies or property may be used for private purposes.

The Board of Regents of The University of Texas System, pursuant to its statutorily granted authority, TEX. EDUC. CODE §§ 65.11, 65.31, has adopted policies and procedures that follow this mandate. The Board prohibits a person from using buildings or facilities owned or controlled by U.T. System or any of its component institutions "for any purpose other than in the course of the regular programs or activities related to the role and mission of the U.T. System or component institution," unless authorized by the Regent's rules. Ex. 3 at 1, § 6.2.

The laws and policies make absolutely certain that the University did not, indeed it could not, have entrusted the laboratory to Dr. Stotter to serve as his personal laboratory or a storage unit for his personally owned chemicals and equipment. Dr. Stotter was using the laboratory for its intended purposes, within the course and scope of the job he was hired to do and

for which he was paid---to teach, conduct research, attract grants to the University---or he was using it for his own private purposes. He can not have it both ways. If his private use of the lab was more than incidental and intended to benefit him personally, his actions could be considered criminal. Tex. Ethics Comm'n Op. 372 (August 8, 1997) (citing Tex. PENAL CODE § 39.02).

There has been no evidence offered into the record to suggest that Dr. Stotter was conducting a private business for personal gain in his laboratory and Defendant does not suggest that he did. He testified repeatedly that the work he did was *for the University*. It is Dr. Stotter's burden to prove that the property belonged to him. But because Dr. Stotter affirmatively demonstrated that the chemicals and equipment served as the foundation for the work he did at and for UTSA, Dr. Stotter has proved that his research inputs---chemicals and equipment---belonged to UTSA.

B. Dr. Stotter Does Not Have a Protected Property Interest In The Items Purportedly Given to Him By A UT-Austin Dean In 1974.

Dr. Stotter contends that a dean at the University of Texas at Austin gave to him certain *unidentified* University-owned chemicals, equipment, and research notebooks in the mid-1970s. According to Dr. Stotter, this grant of these items to him, even though they were ultimately used in his UTSA-owned laboratory, conferred upon him ownership rights to them. But the most basic tenets of property law teach that this purported gift, as a matter of law,

could not have transferred title to any of these items to Dr. Stotter.

"To make an effective transfer of an ownership interest, the donor must own the property being transferred. The donor cannot transfer to the donee a greater ownership interest in the property than the donor owns." Restatement (Third) of Property § 6.1 cmt. C (2003); *Cf. Jones v. P.A. W.N. Enterprises*, 988 S.W.2d 812, 822 (Tex. App.—Amarillo 1999, pet. denied)(exercise of *de facto* governmental powers gave government no right to convey valid title of property). On the other hand, a person receiving a gift "acquires only whatever interest his or her donor had in the subject of the gift." 38 AM.JUR.2d § 68..

The state is constitutionally prohibited from making grants of public money. TEX. CONST. art. III § 51. Public money was likely used to buy most of the chemicals and equipment in Dr. Stotter's laboratory and UT-Austin, on behalf of the State of Texas, owned these chemicals. Accordingly, while the dean could have legally transferred the equipment and chemicals to UTSA, the dean had no authority to transfer title to any of these items to Dr. Stotter---to do so would have been illegal---and any transfer of these items to Dr. Stotter personally was void. Because UT-Austin owned the chemicals, equipment and notebooks and the dean did not, the dean's purported transfer of these items to Dr. Stotter gave him no property rights whatsoever to them.

VI.
CONCLUSION

The research notebooks for which the jury awarded Dr. Stotter damages did not belong to him under U.T. System policy. Dr. Stotter offered no other source---legal or factual---beyond the policy to support his claimed ownership interest in the notebooks. Dr. Stotter's misunderstanding of the policy's meaning supports only his subjective expectation that the notebooks belonged to him. His expectation is insufficient to establish as a matter of law that they actually, legally belonged to him. Dr. Stotter therefore did not have a protected property interest in the notebooks and had no corresponding right to procedural due process---that is reasonable notice and an opportunity to respond---when the notebooks were removed from the laboratory.

In the event the Court determines the jury determined Dr. Stotter had a protected property interest in the equipment and chemicals, Dr. Stotter has offered no legal or factual support for his contention that those items belonged to him. In fact, the evidence demonstrates otherwise.

Without a protected property interest in the notebooks, chemicals and equipment, there is no basis for the jury's finding that Dr. Stotter did not receive reasonable notice because he was not entitled to it. The Court should accordingly disregard the jury's verdict and enter judgment in Guy Bailey's favor.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-50305

United States District Court
Fifth Circuit
FILED
November 27, 2007
Charles R. Fulbruge III
Clerk

PHILIP L. STOTTER, PH.D
Plaintiff-Appellant

v.

UNIVERSITY OF TEXAS AT SAN ANTONIO, GUY BAILEY, DAVID JOHNSON
Defendants – Appellees

PHILIP L. STOTTER, PH.D
Plaintiff – Appellant

v.

UNIVERSITY OF TEXAS AT SAN ANTONIO, THE BOARD OF REGENTS, RICHARD ROMO, GUY BAILEY
Defendants – Appellees

Appeal from the United States District Court
For the Western District of Texas

ON PETITION FOR PANEL REHEARING

Before DENNIS, PRADO, Circuit Judges, and ENGELHARDT, District Judge.*

DENNIS, Circuit Judge:

This case involves the termination of an employment contract of a tenured professor, Philip L. Stotter, Ph.D, at the University of Texas at San Antonio ("UTSA") and the alleged destruction of his personal property. UTSA terminated its contract with Dr. Stotter because of his alleged repeated refusal to improve the conditions of his lab and office, both of which allegedly posed serious health and safety hazards. Upon remedying these issues, UTSA allegedly discarded several pieces of personal property belonging to Dr. Stotter without giving him sufficient opportunity to retrieve them. Dr. Stotter filed a § 1983 procedural due process claim against UTSA, Dr. Guy Bailey, and Dr. David Johnson; and equal protection and First Amendment claims against UTSA, the Board of Regents, Dr. Bailey, and Dr. Richard Romo. The district court granted summary judgment in favor of the defendants. On November 5, 2007, we affirmed, in part, reversed, in part, and remanded this case to the district court for proceedings consistent with that opinion. On November 19, 2007, UTSA filed a motion for panel rehearing. We hereby GRANT the motion, VACATE the prior panel opinion, and SUBSTITUTE this opinion in its place.

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* District Judge of the Eastern District of Louisiana, sitting by designation.

I. BACKGROUND

Philip L. Stotter, Ph.D, had been a tenured professor in the Department of Chemistry at UTSA since 1974. UTSA provided him with a lab and an office to perform research, teach students, meet with colleagues, and otherwise perform the normal functions of being a faculty member.

In December of 1998 and January of 1999, UTSA inspected several labs in the Chemistry Department due to reports of potential health and safety hazards and, according to Dr. Stotter, the possibility of "drug-making activity" associated with the lab of a colleague, Dr. Budalur Thayagarajan. Richard Garza, a UTSA employee, informed Dr. Weldon Hammond, the Director of Earth and Physical Sciences and supervisor of the Department of Chemistry, that the labs of Drs. Thayagarajan and Stotter needed immediate attention. Dr. Thayagarajan's lab was in need of an emergency eye wash station and proper storage containers and two refrigerators required cleaning. Dr. Stotter's lab lacked personal protective equipment and proper storage containers and one refrigerator required cleaning. According to UTSA, Dr. Stotter was verbally notified that these deficiencies needed to be corrected.

On February 16, 1999, according to Dr. Stotter, UTSA determined that Dr. Thayagarajan's lab had "big" problems. Several unidentified chemicals required special handling, some of which were toxic, and two refrigerators were in need of decontamination. In May and June of 1999, according to Dr. Stotter, UTSA determined that the lab might

also contain TNT and old ethers and that a bomb squad might have to remove these hazards. UTSA eventually contracted with a company to clean the lab.

In December of 1999, UTSA conducted routine inspections of the faculty offices and determined that Dr. Stotter's office was an "extreme fire hazard" due to papers, trash, and boxes. Dr. Stotter alleges that he was not present for this inspection, did not receive a copy of the report, and was not requested to take any action. According to UTSA, he was verbally notified to clean his office.

In March of 2000, UTSA again inspected Dr. Stotter's lab and determined that some problems still needed attention. Dr. Stotter alleges that he was not present for this inspection and did not receive a copy of the report until October or November of 2000. It was later discovered that the report was emailed to Dr. Stotter, but he was not using the UTSA email system at the time.

In the summer of 2000, Dr. Stotter accepted a summer appointment at Los Alamos National Laboratory in New Mexico. During that time, he closed his lab. On August 14, 2000, while in New Mexico, Dr. Stotter sent a memo to UTSA officials and members of the faculty addressing an ongoing dispute regarding his medical leave during 1989-1991 and through 1993. At one point in his memo, he referred to an "administrative misuse of [his] benefits at UTSA."

In October of 2000, UTSA again inspected Dr. Stotters office and determined that problems still existed. Dr. Hammond sent Dr. Stotter an

email requesting that he correct the situation as soon as possible. Due to health issues, Dr. Stotter was given until November 10, 2000 to clean his office. On October 31, 2000, UTSA also advised Dr. Stotter that he needed to address the issues regarding his lab to avoid closure. Plans to clean his office subsequently fell through. On December 18, 2000, UTSA conducted additional inspections of the labs and found that several labs, including Dr. Stotters, still had problems. Dr. Stotter alleges he did not receive this report until January 8, 2001.

On January 2, 2001, Dr. Hammond sent Dr. Stotter two letters indicating that he had violated UTSA's health and safety regulations, that he had been notified several times about these violations, and that UTSA intended to remedy the situation with his office on January 8, 2001. The second letter indicated that Provost Dr. Guy Bailey had been notified and was now involved. Dr. Stotter responded with a letter to Dr. Hammond, Dr. Bailey, and UTSA President Dr. Ricardo Romo, detailing his efforts to address these problems. He indicated that he had met with a safety officer about removing the chemicals from his lab and that several colleagues and students were going to help him clean his office sometime in the first week of January. By the end of the first week of January, however, the office had not yet been cleaned, and on January 8, 2001, UTSA proceeded with its plans to clean it. Dr. Stotter tried to halt the cleanup effort and caused such a disturbance that UTSA police handcuffed him, took him to his car, and advised him to leave the premises.

On January 12, 2001, Dr. Romo sent a letter to Dr. Stotter informing him that he was being suspended with pay pending an investigation regarding the complaints about his lab and office, his unwillingness to remedy the situation, and the incident with UTSA police.[5] On February 16, 2001, Dr. Bailey interviewed Dr. Stotter. During the interview, according to Dr. Bailey, Dr. Stotter admitted that the lab had safety issues but stated that it was not his fault because several faculty members were using the lab for storage. He indicated that a student was going to help him clean it at some uncertain future date. With respect to his office, he indicated that he used it for storage and that his attempts to clean it had fallen through. Dr. Bailey also inquired about Dr. Stotter's prior email regarding medical leave. He advised Dr. Stotter that UTSA officials thought the matter was resolved back in 1992. After the meeting, Dr. Bailey concluded that he could not rely on Dr. Stotter to clean his lab.

On February 23, 2001, Dr. Bailey sent a certified letter to Dr. Stotter informing him that UTSA closed his lab and that UTSA would clean it on February 26, 2001. The letter instructed Dr. Stotter to contact Dr. Hammond prior to February 26, 2001, to arrange for a police escort if he had any personal items to pick up. Notice of the letter did

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[5] 1 Dr. Stotter alleges that at the same time similar problems still existed with Dr. Thayagarajan's lab. According to UTSA, however, Dr. Thayagarajan took responsibility for his lab, but was unable to finish the cleanup because of health-related issues. Thereafter, Dr. Thayagarajan worked with UTSA to close his lab in 1999 and retired in 2000.

not reach Dr. Stotter until February 28, 2001, two days after the clean up had already occurred. On March 7, 2001, UTSA permitted Dr. Stotter to enter his lab. According to Dr. Stotter, UTSA discarded all of his personal property that was stored in his lab.

On April 2, 2001, Dr. Bailey recommended to Dr. Romo that Dr. Stotters contract be terminated for good cause. On May 1, 2001, Dr. Romo sent a letter to Dr. Stotter extending him an opportunity to meet and discuss the matter. They met on May 11, 2001. After reviewing the allegations, Dr. Romo agreed to terminate Dr. Stotters contract for good cause.

On the same day, Dr. Stotter filed suit in state court against UTSA, Dr. Bailey, and UTSA Associate Vice President of Academic Affairs Dr. David Johnson[6] alleging a § 1983 procedural due process claim and seeking a temporary restraining order, a preliminary injunction, and declaratory relief. A temporary restraining order issued and the case was subsequently removed to federal court. On August 7, 2001, a motion for a preliminary injunction was denied.

Meanwhile, Dr. Stotter invoked the grievance procedures at UTSA. According to those procedures, a panel of UTSA tenured professors hear the grievance in the first instance and make a recommendation to the Board of Regents, which then approves, rejects, or amends the hearing

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[6] The district court granted Dr. Johnson's motion to dismiss on qualified immunity grounds. Dr. Stotter did not appeal that decision and the issue is not before us.

panel's findings. The Board of Regents is also required to state in writing the reason for its decision and send a notice of the decision to the accused faculty member.

After a four-day hearing, the grievance panel reached an unanimous decision that there was no good cause to terminate Dr. Stotter's contract. Nonetheless, on February 14, 2002, the Board of Regents, with the exception of one abstaining Regent, voted to terminate Dr. Stotter's contract. On February 20, 2002, the Board of Regents sent a certified letter to Dr. Stotter explaining that although it accepted the findings of fact of the grievance panel, it rejected the conclusion that no good cause existed for termination.

Dr. Stotter proceeded with his § 1983 procedural due process claim in federal court. He also filed a separate lawsuit against UTSA, the Board of Regents, Dr. Bailey, and Dr. Romo alleging equal protection and First Amendment violations arising out of his termination. The district court consolidated the two suits. On November 22, 2005, the district court granted summary judgment in favor of the defendants, filing a revised order on December 27, 2005, granting the same. On February 27, 2006, Dr. Stotter filed an untimely notice of appeal, along with a timely motion to extend the time to file a notice of appeal. Finding good cause, the district court granted the motion. This appeal followed.

II. STANDARD OF REVIEW

We review a district court's summary judgment ruling *de novo*, applying the same standard as the district court. *Wyatt v. Hunt*

Plywood Co., 297 F.3d 405, 408 (5th Cir. 2002). A party is entitled to summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). On a motion for summary judgment, this court must view the facts in the light most favorable to the non-moving party and draw all reasonable inferences in its favor. *See Hockman v. Westward Commc'ns, L.L.C.*, 407 F.3d 317, 325 (5th Cir. 2004). In reviewing the evidence, this court must therefore "refrain from making credibility determinations or weighing the evidence." *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007).

III. Analysis

A. Timeliness of Notice of Appeal

UTSA argues that the district court erred in granting Dr. Stotter's motion to file an untimely notice of appeal. We disagree. The district court entered its amended order of summary judgment on December 27, 2005. Thus, any notice of appeal was due on January 26, 2006. *See* Fed. R. App. P. 4(a)(1)(A). However, Rule 4(a)(5)(A) permits the district court to extend that time if (1) the party so moves no later than 30 days after the time prescribed by Rule 4(a) expires and (2) the party shows excusable neglect or good cause. On February 27, 2006, Dr. Stotter filed a timely motion to extend the time for filing a notice of appeal. The district court granted the motion on the ground that Dr. Stotter established excusable neglect based on the

fact that his counsel accidentally entered the incorrect year into her new computer-based calendar.

This court reviews a district court's ruling on a Rule 4(a)(5) motion based on a determination of excusable neglect for an abuse of discretion. *United States v. Clark*, 51 F.3d 42, 43 n.5 (5th Cir. 1995). However, this court gives more leeway to a district court's determination of excusable neglect when the district court grants the motion for an extension of time. *Midwest Employers Cas. Co. v. Williams*, 161 F.3d 877, 879 (5th Cir. 1998).

When evaluating excusable neglect under Rule 4(a)(5), this court relies on the following standard:

> The determination is at bottom an equitable one, taking account all of the relevant circumstances surrounding the party's omission. These include . . . the danger of prejudice . . . , the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Id. (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993)). Given the leeway granted to district courts under this standard, the minimal delay and prejudice involved, and the excuse provided by Dr. Stotter, we conclude that the district court did not abuse its discretion in granting the motion to extend the time for filing a notice of appeal.

B. Section 1983 - Procedural Due Process Claim

1. UTSA

Dr. Stotter filed his procedural due process claim pursuant to Title 42 of the United States Code, Section 1983. Section 1983 provides a private right of action for damages to individuals who are deprived of "any rights, privileges, or immunities" protected by the Constitution or federal law by any "person" acting under the color of state law. 42 U.S.C. § 1983. The Supreme Court has held that "neither a state or persons acting in their official capacities are 'persons' under § 1983," though state officials in their official capacities, when sued for injunctive relief, are "persons" under § 1983. *Will v. Michigan State Dep't of Police*, 491 U.S. 58, 71 & n.10 (1989); *see also Lapides v. Bd. of Regents of the Univ. Sys. of Georgia*, 535 U.S. 613, 617 (2002). This court has also recognized that state universities as arms of the state are not "persons" under § 1983. *Laxey v. Louisiana Bd. of Trustees*, 22 F.3d 621, 623 n.2 (1994); *Texas v. Walker*, 142 F.3d 813, 820 n.10 (5th Cir. 1998) (noting specifically that University of Texas Health Science Center and Regents of the University of Texas are arms of the state); *see also Gaby v. Bd. of Trs.*, 348 F.3d 62 (2d Cir. 2003). Thus, Dr. Stotter's § 1983 claim, with respect to UTSA, is invalid.

2. Dr. Bailey

Dr. Stotter argues that Dr. Bailey violated his procedural due process rights by discarding his personal property without giving him sufficient opportunity to retrieve it. The district court conceded that the February 23, 2001 notice letter was insufficient to give Dr. Stotter sufficient time

to remove any personal items from his lab prior to the February 26, 2001 cleanup. We agree. In fact, Dr. Stotter did not even receive the notice letter until after his lab was cleaned and his personal property allegedly discarded. Nonetheless, the district court granted the motion for summary judgment in favor of the defendants on two grounds. First, the district court held that because an adequate post-deprivation remedy was available, *i.e.*, a state conversion claim, Dr. Stotter could not establish a procedural due process violation. Dr. Stotter counters that there is no adequate post-deprivation remedy available in this case because the defendants are immune from suit under the Texas Tort Claims Act. *See* Tex. Civ. Prac. & Rem. Code § 101.021 (2007). Dr. Stotter is correct that under Texas law, conversion is considered an intentional tort for which the Texas Tort Claims Act preserves immunity. *See Tex. River Barges v. City of San Antonio*, 21 S.W.3d 347, 356-57 (Tex. App. 2000). However, we need not address the issue of whether a defendants entitlement to immunity renders a post-deprivation remedy unavailable because Dr. Stotter is not required to establish the unavailability of post-deprivation remedies in this case.

Under the *Parratt/Hudson* doctrine "an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available." *Hudson v. Palmer*, 468 U.S. 517, 533 (1984); *see also Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part on other grounds by Daniels v.*

Williams, 474 U.S. 327 (1986). The key word is "unauthorized." The Supreme Court later clarified that if the deprivation was authorized by the state and the state had an opportunity to provide some type of pre-deprivation remedy, failure to do so implicates the due process clause. *Zinermon v. Burch*, 494 U.S. 113, 127-30 (1990). In applying *Zinermon*, this circuit has held that a § 1983 action for deprivation of procedural due process is barred if a state has adequate post-deprivation remedies and the following conditions exist: (1) the deprivation must truly have been unpredictable or unforeseeable; (2) pre- deprivation process would have been impossible or impotent to counter the state actors particular conduct; and (3) the conduct must have been unauthorized in the sense that it was not within the officials express or implied authority. *Caine v. Hardy*, 943 F.2d 1406, 1413 (5th Cir. 1991) (en banc). Otherwise, a § 1983 action for deprivation of procedural due process is not barred under the *Parratt/Hudson* doctrine.

Here, the deprivation was both predictable and foreseeable. In fact, not only was it *possible* for Dr. Bailey to provide a pre-deprivation remedy in this case, he attempted to do so by sending Dr. Stotter a letter giving him an opportunity to remove any personal items from his lab. Moreover, UTSA and Dr. Bailey specifically authorized the deprivation. *See, e.g., Allen v. Thomas*, 388 F.3d 147, 149 (5th Cir. 2004) (holding that because personal property was confiscated under authority of prison administrative directive, it was not random or unauthorized); *Brooks v. George County*, 84 F.3d 157, 165 (5th Cir. 1996) (holding that actions according to official policy cannot be considered

random or unauthorized). In short, because the alleged deprivation was authorized, the deprivation was foreseeable, Dr. Bailey had an opportunity to provide a pre-deprivation remedy, and he failed to give Dr. Stotter sufficient time to collect his personal items prior to allegedly discarding them, the district court erred in dismissing Dr. Stotter's procedural due process claim on the basis of the availability of an adequate post-deprivation remedy. The second reason the district court dismissed Dr. Stotter's procedural due process claim was because, according to the district court, Dr. Stotter failed to identify any particular item that was removed from his lab in which he had a sufficient property interest. We disagree. Property interests protected by the procedural due process clause include, at the very least, ownership of real estate, chattels, and money. *Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972); *Mahone v. Addicks Util. Dist.*, 836 F.2d 921, 929 (5th Cir. 1988). In concluding that Dr. Stotter did not have a property interest in any of the materials in his lab, the district court failed to construe the evidence in a light most favorable to him. After reviewing the record, there appears to be no evidence or inventory of what was actually removed from the lab. In his affidavit, however, Dr. Stotter states that when he began his employment at UTSA, he brought with him book cases, storage cabinets, a chemical library, personal journals, notebooks, documentation that reflected research and work generated during his tenure at UTSA, and many non-inventoried chemicals and related materials not purchased by UTSA or with any funds belonging to UTSA. He also alleges that Dr. Bailey discarded

these items. Construing this evidence in a light most favorable to Dr. Stotter, a reasonable juror could conclude that he had a property interest in the aforementioned items and Dr. Bailey violated his procedural due process rights by discarding them without giving Dr. Stotter sufficient opportunity to retrieve them. In fact, by giving Dr. Stotter an opportunity to retrieve any personal items, Dr. Bailey effectively conceded that at least as of February 23, 2001, Dr. Stotter had not waived any personal property interest in the items he placed in his lab. Based on the foregoing, we conclude that the district court erred in not finding a procedural due process violation in this case.

Because we hold that Dr. Stotter has set forth sufficient evidence to establish a constitutional violation, we must next address whether Dr. Bailey is entitled to qualified immunity. Indeed, notwithstanding the broad language of § 1983, state officials performing discretionary functions are often protected from liability by the doctrine of qualified immunity, which shields such officials from suit "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *McClendon v. City of Columbia*, 305 F.3d 314, 322 (5th Cir. 2002) (en banc) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). To determine whether an official is entitled to qualified immunity from a suit alleging a constitutional violation, we conduct a familiar two-step inquiry. First, we must ask whether the plaintiff has alleged facts to establish that the official violated the plaintiff's constitutional rights. *Hope v. Pelzer*, 536 U.S. 730, 736 (2002); *Saucier v. Katz*, 533 U.S. 194, 201

(2001) ("A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?"). If the facts do not establish that the official violated the plaintiff's constitutional rights, we need not inquire further. *See Saucier*, 533 U.S. at 201. If they do, the official is nonetheless entitled to qualified immunity unless the court finds that the official's conduct was objectively unreasonable in light of clearly established law at the time of the state actions at issue. *See McClendon*, 305 F.3d at 323. To be "clearly established" for purposes of qualified immunity, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Johnson v. Johnson*, 385 F.3d 503, 524 (5th Cir. 2004) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

Here, the Supreme Court has recognized that the due process clause protects a person's property interests in personal property such as real estate, chattels, and money. *Roth*, 408 U.S. at 576. In *Zinermon*, the Supreme Court reiterated that some type of notice is required prior to the authorized deprivation of one's property. 494 U.S. at 127-28. However, as the district court correctly concluded, the notice Dr. Bailey gave Dr. Stotter was insufficient to satisfy due process because Dr. Stotter did not receive the notice until after his personal property was allegedly discarded. Based on these precedents, a reasonable state official would understand that discarding Dr. Stotter's personal property in this manner violated his procedural due

process rights and that such conduct is objectively unreasonable. Thus, we agree that Dr. Bailey is not entitled to qualified immunity with respect to Dr. Stotter's procedural due process claim.

C. Equal Protection Claims

Dr. Stotter next argues that the defendants treated him differently than others similarly situated in violation of his equal protection rights. In *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), the Supreme Court recognized an equal protection claim based on a "class of one." To establish such a claim, the plaintiff must show that (1) he or she was treated differently from others similarly situated and (2) there was no rational basis for the disparate treatment. *Id.* at 564.[7] We agree that Dr. Stotter has not established that he was treated differently than others similarly situated or that any differential treatment was irrational.

The district court concluded that despite the dearth of evidence regarding the conditions of Dr. Thayagarajan's lab, the two labs had similar hazards and thus, Drs. Stotter and Thayagarajan were similarly situated. However, Dr. Thayagarajan initially took responsibility for the

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[7] The district court granted summary judgment in favor of the defendants with respect to the equal protection claim on the ground that Dr. Stotter did not establish vindictive animus on the part of the defendants. In doing so, the district court relied on *Hilton v. City of Wheeling*, 209 F.3d 1005 (7th Cir. 2000). However, this court has rejected the argument that all "class of one' equal protection claims require a showing of vindictive animus. *See Mikeska v. City of Galveston*, 451 F.3d 376, 381 n.4 (5th Cir. 2003).

deficiencies of his lab and when his health problems prohibited him from cleaning it, he turned his lab over to UTSA and retired shortly thereafter. Dr. Stotter has not offered any evidence to dispute these facts. In fact, when asked if he knew that Dr. Thayagarajan cooperated with UTSA to clean his lab, Dr. Stotter responded at deposition, "I don't know that.' In contrast, Dr. Stotter made several unfulfilled promises to clean his lab. Indeed, even under his version of the facts, he was given notice on October 31, 2000, to clean his lab and by the end of February, 2001, still had not done so. Also, unlike Dr. Thayagarajan, Dr. Stotter allowed deficiencies to exist in his office, in addition to his lab, and when UTSA attempted to remedy the situation, Dr. Stotter created such a scene that he was escorted to his car by UTSA police and advised to leave the premises. There is no evidence that Dr. Thayagarajan ever physically resisted efforts to clean his lab. Thus, the two situations are hardly similar and the confrontation with campus police alone presents, at the very least, a rational basis for treating Dr. Stotter differently. Accordingly, we conclude that Dr. Stotter's equal protection claims lacks merit.

Dr. Stotter also raises an equal protection claim with respect to his salary. He argues that the district court ignored this claim. However, a review of the record reveals that the district court did address this claim. According to the district court, any differential in salary was the result of Dr. Stotter s own failure to submit annual reports required for a salary adjustment. The district court also noted that all of the correspondence from Dr. Stotter s superiors indicates a willingness to

rectify any legitimate shortfall in his salary. Dr. Stotter does not offer any evidence to the contrary. Moreover, an independent review of the record also reveals that Dr. Stotter has not offered any evidence comparing his salary to any other individual, let alone an individual similarly situated. Even if he had, the failure to file the requisite paperwork for a salary adjustment would certainly provide a rational basis for any alleged salary differential. Accordingly, we conclude that this equal protection claim also lacks merit.

D. First Amendment Retaliation Claim

Dr. Stotter argues that the defendants terminated his employment contract in retaliation for his speech involving matters of public concern in violation of the First Amendment. The district court granted summary judgment in favor of the defendants on the ground that Dr. Stotter was unable to establish that the speech at issue was a matter of public concern. We agree.In order to succeed on a First Amendment retaliation claim, Dr. Stotter must show that (1) he suffered an adverse employment decision; (2) his speech involved a matter of public concern; (3) his interest in commenting on matters of public concern outweighs his employers interest in promoting efficiency; and (4) his speech motivated the adverse employment decision. *Whiting v. The Univ. of S. Miss.*, 451 F.3d 339, 350 (5th Cir. 2006); *Beattie v. Madison County Sch. Dist.*, 254 F.3d 595, 601 (5th Cir. 2001); *Harris v. Victoria Indep. Sch. Dist.*, 168 F.3d 216, 220 (5th Cir. 1999). The district court held that Dr. Stotter was unable to establish the second element because the memo at issue was a private grievance

about wages instead of a matter of public concern.

To determine whether an employee's speech addresses a matter of public concern, this court has employed two tests, sometimes used in conjunction with each other. In the first test, this court evaluates the content, form, and context of a given statement. *Bradshaw v. Pittsburgh Indep. Sch. Dist.*, 207 F.3d 814, 818 (5th Cir. 2000); *Teague v. City of Flower Mound*, 179 F.3d 377, 383 (5th Cir. 1999). The second test is the citizen-employee test:

> [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Connick v. Myers, 461 U.S. 138, 147 (1983); *see also Finch v. Fort Bend Indep. Sch. Dist.*, 333 F.3d 555, 563-64 (5th Cir. 2003). Under this latter shorthand" test, this court focuses on whether the plaintiff "[spoke] primarily in his role as a citizen rather than as an employee addressing matters only of personal concern." *Fiesel v. Cherry*, 294 F.3d 664, 668 (5th Cir. 2002). However, the citizen-employee test can sometimes yield indeterminate results because "[t]he existence of an element of personal interest on the part of an employee in the speech does not prevent finding that

the speech as a whole raises issues of public concern." *Dodds v. Childers*, 933 F.2d 271, 273 (5th Cir. 1991). Thus, "[i]n cases involving mixed speech, we are bound to consider the *Connick* factors of content, context, and form, and determine whether the speech is public or private based on these factors." *Teague*, 179 F.3d at 382.

There has been some confusion in this circuit regarding mixed speech cases, *i.e.*, cases in which the employee speaks on a matter of public concern but also has a personal interest as well. *See Kennedy v. Tangipahoa Parish Library Bd. of Control*, 224 F.3d 359, 367 (5th Cir. 2000) (discussing the history of mixed speech cases in the this circuit). Neither the district court nor the parties address the issue of whether this case involves mixed speech. Dr. Stotter does argue that a reference to a previously-raised issue regarding the misuse of his benefits in a personal memo discussing wages transforms his entire memo into protected speech. This argument sounds like a mixed speech argument.

At first glance, it is doubtful that a vague reference to a previously- raised issue regarding the alleged misuse of benefits in a four-page memo that otherwise constitutes a personal grievance about wages is sufficient to place the entire memo into the mixed speech genre. However, this circuit has not been entirely clear on this issue. In *Wilson v. UT Health Ctr.*, 973 F.2d 1263, 1269 (5th Cir. 1992), this court interpreted Supreme Court precedent as "remov[ing] from First Amendment protection only that speech that is made *only* as an employee, and le[aving] intact protection for speech that is made both as an employee and as a citizen." Another panel of this court criticized the broad language in

Wilson, recognizing that "[t]he mere insertion of a scintilla of speech regarding a matter of public concern would make a federal case out of a wholly private matter fueled by private, non-public interests." *Teague*, 179 F.3d at 382. A third panel of this court, however, criticized *Teague* and reiterated that under *Connick*, First Amendment protection is *only* categorically denied to public employees speaking *solely* on matters of personal interest. *Kennedy*, 224 F.3d at 370 n.13 (citing *Connick*, 461 U.S. at 157). Thus, according to that panel, a mere scintilla of speech regarding a matter of public concern is sufficient to treat the entire communication as mixed speech. *Id.* at 372-73. In evaluating these cases, a fourth panel of this court, in an unpublished opinion, reached the same conclusion. *Chavez v. Brownsville Indep. Sch. Dist.*, 135 F. Appx 664, 670 (5th Cir. Jun. 15, 2005). We agree that under *Connick*, even a mere scintilla of speech regarding a matter of public concern is sufficient to treat the entire communication as mixed speech. Thus, because Dr. Stotter made an allegation of malfeasance by state officials, which arguably is an issue of public concern, *see Thompson v. City of Starkville*, 901 F.2d 456, 463 (5th Cir. 1990) (citation omitted), the memo at issue should be treated as mixed speech.

As recognized by this court in *Chavez*, we have used varying approaches with respect to analyzing mixed speech cases. For example, some panels have focused on the content-form-context test and then used the citizen-employee test in the alternative. *See, e.g., Kennedy*, 224 F.3d at 375-76; *Teague*, 179 F.3d at 382; *Thompson*, 901 F.2d at 461-66. Other panels have incorporated the citizen-

employee test into the content portion of the content-form-context test. *See, e.g., Harris*, 168 F.3d at 222; *Davis v. Ector County*, 40 F.3d 777, 783 (5th Cir. 1994); *Dodds*, 933 F.2d at 274; *Moore v. City of Kilgore*, 877 F.2d 364, 370 (5th Cir. 1989). Still, other panels have focused on the citizen-employee test and used the content-form-context test only to aid in that analysis. *See, e.g., Gillum v. City of Kerrville*, 3 F.3d 117, 121 (5th Cir. 1993). Because application of these varying approaches would lead us to the same conclusion, *i.e.*, that the memo at issue does not constitute protected speech, we need not decide which approach is appropriate to use in mixed-speech cases. [8] It is undisputed that the memo at issue is primarily a private grievance about wages. Indeed, to support his claim, Dr. Stotter cites to a single sentence, buried within his four-page memo, in parenthesis no less, discussing an instruction he was allegedly given not to file his annual wage report:

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[8] We do recognize that the distinctions between these varying approaches is somewhat artificial. Indeed, it seems clear that the question of whether an employee was speaking as a "citizen" or as an "employee" under the citizen-employee test is sufficiently covered by the content and context prongs of the content-form-context test. Thus, we fail to discern any significant difference between these varying approaches used to analyze mixed speech cases given that they ultimately ask the same question. In fact, we have been unable to find a single case in which the application of these varying tests brought the panel to different conclusions. *See, e.g., Kennedy*, 224 F.3d at 375 ("Though we are not obligated to apply the citizen-employee test in mixed speech cases, we observe that it produces an identical conclusion."); *Teague*, 179 F.3d at 383 ("Utilizing the simpler 'citizen versus employer' approach produces . . . the same result.").

> Since that time, no one in the Provost's Office has modified or clarified those instructions, despite requests from me and/or from the EPS director for some resolution of the original administrative issues I raised (concerning my appointment status and administrative misuse of my benefits at UTSA from 1989- 1991 and then continuing through 1993).

Based on this passing reference to an issue he apparently raised years ago, which he never substantiates nor explains, Dr. Stotter maintains that his entire memo is protected speech. In evaluating the content, form, and context of this memo, it primarily, if not exclusively, is nothing more than an employer- employee dispute about wages. Indeed, the title of his memo is "Compression Salary Adjustment Beginning AY 2000-1 and Related Matters" and the content deals exclusively with Dr. Stotter's concern over not receiving a "long overdue review of [his] salary status." Internal personnel disputes and management decisions are rarely a matter of public concern. *Branton v. City of Dallas*, 272 F.3d 730, 739 (5th Cir. 2001). There is simply no evidence that in writing this memo, Dr. Stotter was trying to publicize allegations of corruption. In fact, he does not even complain about the purported misuse of benefits in the memo, only referring to the issue in passing as an explanation for his failure to produce his annual reports. He further notes in the memo his hope that "we can separate the salary issues from the other problems and initially resolve the salary question - quickly and amicably, for many reasons." We agree with the district court

that at all times, "Dr. Stotter was speaking as an aggrieved employee, about a classic employment issue: compensation." In short, Dr. Stotter is attempting to take a personal grievance about his wages and turn it into a First Amendment retaliation claim based on some vague reference to a previously-raised issue regarding his benefits. "Post hoc metamorphoses fall short of the constitutional threshold." *Bradshaw*, 207 F.3d at 818. Accordingly, we conclude that Dr. Stotter's First Amendment retaliation claim lacks merit.

IV. CONCLUSION

For the reasons stated herein, we affirm the district court's judgment with respect to the equal protection and First Amendment retaliation claims and reverse the district court's judgment with respect to the § 1983 procedural due process claim. Accordingly, with respect to UTSA, the Board of Regents, and Dr. Romo, we affirm the district court's judgment as to all claims against them; with respect to Dr. Bailey, we remand the procedural due process claim to the district court for proceedings consistent with this opinion.

AFFIRMED, IN PART; REVERSED, IN PART; and REMANDED.